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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

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5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
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BEFORE: THE HONORABLE JENNIFER C. BOAL

MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 12
One Courthouse Way
Boston, MA 02210

May 28, 2015
11:30 a.m.

Catherine A. Handel, RPR-CM, CRR
Official Court Reporter
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(Appearances continue on the next page.)

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Jennifer C. Boal, United States Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on May 28, 2015.)

COURTROOM DEPUTY CLERK YORK: You may be seated.

Today is May 28, 2015. We're on the record in the matter of In Re: New England Compounding Pharmacy Incorporated, et al., Case No. 13-CV-2419.

Will counsel please identify themselves for the record, starting with the Plaintiffs' Steering Committee.

MS. JOHNSON: Good morning, your Honor. Kristen Johnson for the PSC.

MR. GASTEL: Good morning, your Honor. Ben Gastel for the PSC.

MS. DOUGHERTY: Good morning, your Honor. Kim Dougherty for the PSC.

MR. CHALOS: Mark Chalos for the plaintiffs.

MR. ELLIS: Good morning, your Honor. Rick Ellis for the plaintiffs.

MR. GOTTFRIED: Good morning. Michael Gottfried for the trustee, Paul Moore.

MR. GLASS: Your Honor, I'm David Glass. I'm here on behalf of the FDA.

1 MR. TARDIO: Chris Tardio for the Tennessee clinic
2 defendants.

3 THE COURT: Mr. Glass, I should make no associations
4 by the fact of where you're sitting; is that correct?

5 MR. GLASS: No, your Honor.

6 THE COURT: All right.

7 MR. GLASS: The last --

8 THE COURT: We have assigned seats for these things.

9 MR. GLASS: I had no idea that there were place
10 cards.

11 THE COURT: That's fine.

12 MR. GIDEON: C.J. Gideon on behalf of the Tennessee
13 clinic defendants.

14 MR. WOLK: Christopher Wolk, your Honor, on behalf of
15 the Premier defendants.

16 MR. FERN: Frederick Fern, special counsel to the
17 bankruptcy trustee, Judge.

18 MR. PIERCE: Harry Pierce, Sloane & Walsh, on behalf
19 of Glenn Chin, your Honor.

20 MS. PEIRCE: Michelle Peirce from Donoghue Barrett &
21 Singal on behalf of Barry and Lisa Cadden.

22 MR. RABINOVITZ: Your Honor, Dan Rabinovitz. I
23 represent Gregory Conigliaro in the criminal matter and I
24 represent Medical Sales Management, Inc. in the MDL.

25 MR. O'HARA: Good morning, your Honor. Christopher

1 O'Hara from Todd & Weld on behalf of Carla and Doug
2 Conigliaro. With me is my colleague.

3 MS. HALE: Good morning, your Honor. Corrina Hale.

4 MR. KLARFELD: Good morning, your Honor. Joshua
5 Klarfeld on behalf of GDC.

6 MS. PUIG: Your Honor, Yvonne Puig for the St. Thomas
7 Entities, along with Sarah Kelly and Marcy Greer.

8 MS. KELLY: Good morning.

9 MR. MORIARTY: Your Honor, Matthew Moriarty for
10 Ameridose.

11 THE COURT: And I believe we had a couple of people
12 on the phone who thought they might be arguing as well. If
13 you could introduce yourselves.

14 MR. KIRBY: Yes, your Honor. This is Greg Kirby on
15 behalf of the Box Hill defendants. Can you hear me okay?

16 THE COURT: Yes.

17 MR. KIRBY: I'm not actually sure if my issue will be
18 in front of you or in front of Judge Zobel later this
19 afternoon, but it was listed on both agendas. So, I thought I
20 would make sure to be included, if necessary. So, thank you
21 for letting me appear by telephone.

22 THE COURT: Anyone else on the phone?

23 (No response.)

24 THE COURT: No. So, for -- and I think it's the
25 usual procedure in this case for the benefit of the people who

1 are on the phone, if those arguing could stay seated and move
2 the microphone as close as possible to them, if they could.

3 (Attorney Stranch enters courtroom.)

4 THE COURT: So, Ms. Johnson or -- I don't know if
5 it's Mr. Gastel, given that it's not Judge Zobel here. Are
6 you going to be running us through the agenda or did you want
7 me to do so?

8 MS. JOHNSON: We're happy to do that. Mr. Gastel and
9 I are tag teaming this morning, your Honor, if that's okay.

10 THE COURT: Otherwise, I would have to call him
11 "Gastel-Johnson."

12 MS. JOHNSON: That's right.

13 So, the PSC, your Honor -- we have not done this
14 before for hearings before you, but we took the liberty of
15 putting together a proposed agenda. We tried to do this
16 jointly. We did circulate it to other parties in advance, but
17 given the timing of it, I am not sure everyone signed off.
18 So, this is our best effort to list all of the discovery-
19 related motions that are fully briefed and ready for argument
20 before your Honor today.

21 With that caveat, the first motion that I believe is
22 ready to go is the Tennessee Clinic Defendants' motions to
23 compel the FDA's compliance with its subpoena, which is No. 1
24 on the agenda.

25 THE COURT: All right. So, who is going to speak on

1 behalf of that?

2 MR. GIDEON: It's actually up to your preference,
3 your Honor. We have in response to our motion to compel a
4 motion for protective order by the United States represented
5 by Mr. Glass. So, it's entirely up to you which of us you
6 hear first.

7 THE COURT: Well, since you filed first, we'll go
8 with you first.

9 MR. GIDEON: All right. We on behalf of the
10 Tennessee Clinic Defendants respectfully submit that the
11 motion filed by the FDA and the United States should be
12 denied.

13 At present, if I've read all the pleadings correctly,
14 the only real issue is timing. If you look at Document 1881,
15 that's expressly stated in Mr. Glass' response.

16 At the outset of my presentation, I want you to know
17 that our assertion of comparative fault and our need to obtain
18 information from the FDA is not something we just stumbled
19 into. There's an implication in one of the pleadings filed by
20 one of the parties here that this was our effort to delay the
21 resolution of these issues and delay a trial. That couldn't
22 be further from the truth.

23 We made our initial assertion of comparative fault as
24 to the FDA on March 1st, 2013, in the state court litigation
25 in a very, very detailed rendition of what we thought at the

1 time they had done that contributed to the outcome. We need
2 to obtain discovery from the FDA to cover their duty; their
3 failure to make a trove of information that they had publicly
4 available; their multiple complaints that they received, not
5 just from insiders at NECC and Ameridose, but from other
6 regulators around the country, including Colorado; their
7 failure to follow up on the December 4, 2006 warning letter;
8 and their failure to comply -- their inexplicable failure to
9 comply with their own 2002 compliance policy guidelines.

10 The bottom line is, most of the information that we
11 wish to obtain deals with the conduct or misconduct of the FDA
12 that precedes September of 2012. So, in that respect, I'll
13 anticipate the argument being made by Mr. Glass and that is
14 that's really going to impair our prosecution of these people.

15 I don't think so. It's going to deal with the
16 conduct of the FDA, the information they had, and what they
17 didn't do about it.

18 Taking a look at the seven-factor test from *Micro*
19 *Financial*, First Circuit, in terms of whether you should
20 postpone this deposition or not, we respectfully submit you
21 should not, and that all the factors favor -- granted, there's
22 a balancing and there's not a perfect answer to this issue,
23 but all the factors favor allowing us to proceed, and those
24 factors that I would like to address are:

25 First, the interest of my client in proceeding

1 expeditiously to defend the claims that are pending against
2 them as well as the interests of all the plaintiffs whose
3 cases are currently joined here to have an expeditious
4 resolution of this case.

5 Secondly, hardship on the criminal defendants and the
6 FDA, I respectfully submit, is minimal. In large respect,
7 we're going to be dealing with the conduct of the FDA before
8 September 2012, which I can't see impairing the criminal
9 prosecution of the defendants.

10 The third factor, convenience to the courts. That
11 would permit not only the Tennessee Clinic Defendants and the
12 St. Thomas Entities, but the folks in New Jersey, Michigan and
13 elsewhere to obtain this common discovery in an expedited
14 fashion.

15 Fourth, public interest does not favor a stay and I
16 respectfully submit the Court should look at *SEC vs. K2*
17 *Unlimited*, 15 F.Supp 3d, District of Massachusetts (2014),
18 which specifically points to the risk of fading memories, loss
19 of documents and death of witnesses. Our principal
20 accusations against the FDA begin in 2002 and continue for a
21 period of eleven years. So that risk is very real here.

22 And, finally, with respect to that, the United States
23 waited until September 16th, 2014 to indict, over two years
24 after this controversy occurred. I respectfully submit, we
25 should not have to wait until the criminal proceeding is

1 concluded.

2 The other reason why this is so important to us is
3 that in a federal court proceeding under §803(8), we can
4 utilize the data obtained by the FDA after the inspections
5 finally occurred to establish liability as to NECC.

6 So, for those reasons, we respectfully request that
7 you deny the motion for protective order and allow us to
8 proceed. Any questions?

9 THE COURT: Yes. So, I'm not quite as familiar with
10 the defense as I should be of comparative fault.

11 MR. GIDEON: All right.

12 THE COURT: So, my limited understanding is that the
13 entity to which you're trying to ascribe comparative fault is
14 not actually a party to the lawsuit, but rather someone you
15 could point to and say you should diminish my liability
16 because of the other entity's culpability.

17 MR. GIDEON: That is correct.

18 THE COURT: Okay. And perhaps you could just expand
19 on that a little bit, what you would try to show with respect
20 to the FDA, and I think that actually applies to the other
21 defendants as well.

22 MR. GIDEON: Sure. A little background.

23 Tennessee adopted comparative fault in a modified
24 comparative fault fashion when the Supreme Court decided the
25 *McIntyre vs. Balentine* case in 1992. We have the right to

1 assert comparative fault and then the jury is permitted to
2 ascribe fault to that nonparty entity based on the evidence
3 that's presented. The fault has to cause or contribute to the
4 outcome and when you assert comparative fault, the defendant
5 asserting comparative fault has the burden of proof on that
6 point.

7 It's been through a number of iterations since 1992,
8 but one point that's probably quite material to your Honor's
9 determination is there is a specific Supreme Court decision
10 that holds that even an immune entity may be identified as a
11 comparatively-at-fault party, with the purpose being to make
12 sure that allocation of responsibility follows the degree of
13 fault that that entity is guilty of.

14 THE COURT: Meaning, that in this case -- and I
15 express no opinion on it, but the United States has a lot of
16 sovereign immunity defenses. Perhaps they would not be
17 subject to suit as a defendant.

18 MR. GIDEON: Correct.

19 THE COURT: But they could be named in a comparative
20 fault defense.

21 MR. GIDEON: That's explicitly correct.

22 THE COURT: Okay. And I believe the government brief
23 had alluded to an agreement to produce documents.

24 MR. GIDEON: Yes.

25 THE COURT: And I just wondered what your position

1 was on that. Have you received documents or what is the
2 agreement and the timetable from your perspective?

3 MR. GIDEON: The agreement is they are coming, but we
4 have not received the documents. We have outstanding FOIA
5 requests to the FDA as well from quite some time ago, but we
6 haven't received the material data that we have been seeking
7 for some time.

8 THE COURT: I had taken this as a settlement, to the
9 extent you might call that, with respect to what I would call
10 your *Twomey* requests. And then the FOIA requests, while being
11 overlapping, might be a separate issue.

12 MR. GIDEON: That's correct.

13 THE COURT: All right. That's all the questions that
14 I had for you. Mr. Glass.

15 MR. GLASS: Thank you, your Honor.

16 Let me first speak to the documents. What happened
17 immediately after this meningitis outbreak was that Congress
18 hauled the Commissioner of Food and Drugs before it and in
19 connection with that, there were document requests from
20 several committees and subcommittees of Congress for documents
21 from FDA.

22 In response to those requests, FDA produced a total
23 of approximately 52,000 pages of documents. There may be
24 duplication in there because there were multiple requests.

25 What we have agreed with the Tennessee Clinic

1 Defendants is that we will review those documents for
2 responsiveness to the subpoena and also for privilege and we
3 will produce all of the -- all of the non-privileged
4 responsive material.

5 This is a new venture for FDA. We have been using an
6 ediscovery platform now. Their current timetable is that they
7 are hopeful that they can have an initial release of these
8 documents in a week or two and to be finished by the end of
9 July. So, those documents are on their way, and we are fairly
10 confident that much, if not all, of what the Tennessee Clinic
11 Defendants are looking for is going to be in those documents,
12 but they are on their way. Mr. Gideon is correct that they
13 haven't arrived yet, but that process is working.

14 THE COURT: So, this would include materials prior to
15 2012?

16 MR. GLASS: Correct. Correct. I think that
17 basically -- I'm trying to think, but I think that's basically
18 correct.

19 If I may speak to the rest of what Mr. Gideon had to
20 say. Of course, we disagree. We are not here to interfere
21 with the civil cases, but this is an important criminal
22 prosecution. 64 or 65 people died here. People are charged
23 with murder, and we think on the basis of that, that criminal
24 case should be entitled to a certain amount of precedence here.

25 We think that there are going to be problems if these

1 depositions take place before the criminal trial. We are
2 fairly confident that the transcripts of the depositions will
3 become public, regardless of whether they are covered by a
4 protective order. We think that's inevitable. You have 680
5 separate civil actions and a lot of people are going to have
6 access to those transcripts and we, therefore, are concerned
7 that the criminal defendants are going to get access to these
8 transcripts and when that happens, they can try and tailor
9 their defenses to the testimony. They can also try and use
10 those transcripts for the purpose of trying to impeach the
11 government's trial witnesses because FDA personnel are going
12 to be called in the trial.

13 We are not concerned that anybody is going to say
14 anything of substance different at his or her deposition than
15 what he or she would say at trial, but nobody ever answers the
16 same question exactly the same way twice. It's going to be a
17 fertile field for impeachment challenges. So, we're concerned
18 about that.

19 We're also concerned that once these transcripts
20 become public -- and, as I say, we're sure they will become
21 public -- they will hit the media and there's likely to be
22 another media flurry about this case and that could make it
23 more difficult to pick a fair and impartial jury.

24 Another problem we see is that since the FDA
25 personnel are likely to be called at trial, that the

1 prosecution team is going to have to become involved in
2 witness preparation. That's going to take them away from all
3 of the other things that they need to be doing to prepare this
4 case for trial and that process is going to be exacerbated if,
5 as we think possible, that these depositions lead to other
6 depositions of potential government witnesses.

7 We're aware that there's a tension in what we are
8 suggesting here between early dates in the civil trials and
9 the stay that we are seeking.

10 There are a couple of consolations that we see here.
11 First, it's my understanding that there is now a \$200 million
12 settlement fund for the plaintiffs. So, perhaps, the early
13 trial dates are not as important as they were.

14 Second, once the trial is held, the trial transcripts
15 will be available for everybody to use in the civil trials and
16 that may, in the long run, make it less necessary for anybody
17 to take any depositions of FDA personnel.

18 And, finally, it's documents that we're producing.
19 Those, too, may make it unnecessary for there to be any
20 depositions here.

21 So, Mr. Gideon alluded to the First Circuit case,
22 *Micro Financial*. That makes it clear that all of these cases
23 are sui generis when a stay of civil proceedings are sought in
24 parallel criminal proceedings. We think this is the ideal
25 case for that because there is pretty much complete overlap in

1 the issues between the two cases. Both the criminal case and
2 the civil cases arose out of the same conduct on behalf of
3 NECC and the people who were running it. So, we think this is
4 an appropriate case for a stay of the FDA depositions pending
5 the criminal trial and we ask that that be entered.

6 THE COURT: So, Mr. Glass, it seemed as if the FDA
7 has dealt with all the categories of information that were
8 sought in equal manner, and it seems to me that, actually, the
9 information has different levels of sensitivity.

10 So, for example, at the high end of sensitivity, I
11 would imagine from the government's perspective, is the actual
12 investigation after 2012.

13 MR. GLASS: That's correct.

14 THE COURT: And then of perhaps less sensitivity is
15 the activity that preceded 2012 and, perhaps, FDA's authority
16 to investigate, those sorts of categories. So -- and then I
17 think there was also a suggestion about authentication of
18 documents.

19 So, why shouldn't I allow a deposition on the less
20 sensitive topics, but stay any questioning of the more
21 sensitive topics?

22 MR. GLASS: Your Honor, it's -- all of the concerns
23 that I outlined are going to attach to that if these
24 transcripts become available. And on top of that, you're
25 still going to have the issue of having the prosecutors get

1 involved with witness preparation and all of the disruption
2 that that would entail.

3 THE COURT: And what about authentication of
4 documents, do you think there's some procedure that could be
5 worked out for that purpose?

6 MR. GLASS: It's a while since I looked at the
7 authentication rule, but I believe the government documents
8 are self-authenticating, I suppose, except for any corporate
9 documents that are in there.

10 THE COURT: All right. Now, I believed the PSC had
11 filed a response to these motions as well.

12 MS. JOHNSON: We did, your Honor, and I would make
13 two points to the Court.

14 The first is that the PSC's position is that the
15 production of documents by the FDA is the logical starting
16 point and possibly the ending point. It is those documents
17 that will reveal what knowledge the FDA had before 2012, which
18 seems to be one of the reasons, at least, the St. Thomas
19 Clinics are requesting this information, deposition.

20 St. Thomas -- or I'm sorry -- Tennessee Clinics have
21 put forward three reasons that they're entitled to discovery
22 here. Those reasons may be enough to get them documents.
23 It's not clear to the PSC that those reasons require
24 depositions.

25 To that end, there is much publicly-available

1 information already about the FDA's knowledge and the FDA's
2 position that has already been available for quite some time
3 attendant to the congressional investigation and other ongoing
4 discussions.

5 Given all of that, the PSC would strongly encourage
6 the Court to consider not deciding the deposition issue until
7 the documents have been produced and the Tennessee clinics
8 have had an opportunity to review those documents and
9 determine whether a deposition is really necessary.

10 The second point I would make, your Honor, is a
11 larger overall issue, which is this: The discovery disputes
12 that are before your Honor today, including this dispute with
13 the FDA's deposition, should not derail this MDL to the point
14 where the victims are required to wait until after resolution
15 of the criminal matters.

16 Now, I don't hear Mr. Glass saying that. I hear him
17 saying the opposite, that this is a logical situation to have
18 these cases running in parallel, and so far that has been done
19 and I think done effectively, but we would ask that this Court
20 strongly consider that parallel approach and, therefore, when
21 making these decisions, we would hope that the Court would
22 encourage this MDL to continue running apace.

23 And, finally, if the Court is to consider the option
24 of ordering a deposition of FDA that is somewhat tailored --
25 you mentioned the possibility of perhaps less sensitive topics

1 would go forward -- I would just note as to Mr. Glass'
2 concern, that there are many different ways that we could
3 craft a protective order to restrict access to those
4 documents. I don't say that to suggest that access to those
5 depositions should be very tightly controlled. I don't mean
6 to be taking a position, but there are certainly lots of
7 opportunities for us to -- and for the Court to decide what
8 the appropriate level of access would be. Thank you.

9 THE COURT: All right. Does anyone else wish to
10 speak to this motion?

11 MR. GIDEON: May I be heard one more time, your
12 Honor?

13 THE COURT: Yes.

14 MR. GIDEON: It seems that the FDA, NECC and several
15 of the other parties in this, participants in this, suggest
16 that we should defend our client simply by walking into a
17 courtroom with boxes of documents and just presenting the
18 documents. That's not going to work.

19 We need to have witnesses to carry out discharging
20 our burden of proving that the FDA was complicit in this
21 calamity, and we need to have people who have been informed so
22 that they can answer specific questions.

23 Secondly, while I understand what Mr. Glass is
24 talking about, he doesn't want to divert the attention of an
25 AUSA who is preparing for trial to get someone ready for

1 deposition, it's not all a waste of time. They're going to be
2 preparing the same witness to present to obtain direct
3 testimony. I think while there may be some waste, it won't be
4 significant.

5 Third, at least with respect to the Tennessee
6 litigation and certainly from our standpoint and from the
7 standpoint of St. Thomas, there have been no leaks to the
8 media and there won't be any leaks to the media about
9 deposition testimony, and the cases will be tried in Nashville
10 or perhaps in Cookeville. So, it's very unlikely that
11 anything that comes out of that is going to affect a trial
12 here of the Caddens, Conigliaros, and others.

13 So, I respectfully request that you permit us the
14 option to do what we've been working on since February, and
15 that is have that FDA representative answer specific questions
16 we've been seeking to have answers to since March of 2013.

17 THE COURT: And I believe Judge Zobel may be asking
18 about this as well, but in terms of the comparative fault
19 defense, that would seem to me to be the gravamen of the
20 allegations here, right, the negligence? But are there other
21 claims against your client that do not have a comparative
22 fault defense?

23 MR. GIDEON: No.

24 THE COURT: Okay.

25 MR. GIDEON: And it is -- as I said in the second

1 half of this, we're encountering difficulties finding anyone
2 who will be supplied by NECC to answer questions about NECC.

3 One of the nice things about being in federal court
4 is §803(8) will allow us to take the testimony from the FDA to
5 establish why these three lots were contaminated, what they
6 were contaminated with, what caused the contamination, which
7 will certainly aid in the presentation of our comparative
8 fault claims against these individual defendants and NECC.
9 So, it has two major reasons for occurring.

10 THE COURT: All right. Does anyone else wish to
11 speak to this?

12 MR. GLASS: Your Honor, may I just address very
13 briefly here?

14 THE COURT: Yes, absolutely.

15 MR. GLASS: First, Ms. Johnson referred to the
16 availability of documents. I should point out -- and this is
17 an attachment, actually, to Tennessee Clinic Defendants'
18 papers. After the Commissioner of Food and Drugs was hauled
19 before Congress, there was a scathing congressional report
20 that came out accusing FDA of all kinds of misconduct, citing
21 the documents that we produced. So, that's all on the record,
22 what we did or what we didn't do or what we should have done.
23 So, that's all available.

24 Mr. Gideon referred earlier to fading memories and
25 death of witnesses and why it was important for depositions to

1 be taken. Now, these are 30(b)(6) depositions. So, somebody
2 will show up on behalf of FDA. The FDA is not going any
3 place.

4 The last thing that Mr. Gideon talked about was the
5 two years that it took for the government to indict anybody.
6 Well, the government needs to take its time when it's going to
7 accuse people of murder and defrauding the government. So,
8 there's nothing improper about that.

9 And we do think these transcripts are going to become
10 public and we do think there's a good chance that they could
11 reach the defendants. So, we ask that this protective order
12 be entered.

13 THE COURT: All right. Thank you.

14 MR. GASTEL: Can I just address one quick thing?

15 THE COURT: Yes.

16 MR. GASTEL: And correct from the plaintiffs'
17 perspective an answer that Mr. Gideon gave regarding Tennessee
18 law on comparative fault.

19 The plaintiffs very much disagree with Mr. Gideon's
20 claims that there's not claims pending against his clients in
21 which comparative fault does not attach. Plaintiffs have
22 claims under the Tennessee Products Liability Act and I think
23 that Tennessee law is crystal clear on this issue, that joint
24 and several liability continues to apply to claims under the
25 Tennessee Products Liability Act, and I would direct the Court

1 to the *Owens vs. Truck Stop of America* case from the Tennessee
2 Supreme Court, which I think does a very good job of
3 explaining how claims under the Tennessee Product Liability
4 Act survive the change to the comparative fault regime in
5 Tennessee.

6 THE COURT: Thank you.

7 So, Ms. Johnson, will you be moving us along or --

8 MS. JOHNSON: Yes, your Honor. That brings us to the
9 second item on our agenda, which is -- it's a litany. The
10 heading is, "Motions to Quash and for Protective Order." I
11 will speak generally and say that these are motions filed by
12 the affiliated defendants, the insiders, and related entities,
13 seeking relief from this Court in response to discovery
14 requests.

15 THE COURT: All right. And it looks like you have
16 teed up Mr. Moore's motion, yes.

17 MR. GOTTFRIED: Thank you, your Honor. Michael
18 Gottfried from the trustee, Paul Moore.

19 First of all, on the agenda, Item 2-a. and -- well,
20 there is no motion with respect to 2-b., which was our
21 objection to the subpoena duces tecum, I think that's where I
22 would like to start, which is to tell the Court that the
23 motion for protective order pertains only to the request for
24 the 30(b)(6) deposition.

25 The trustee on May 1st filed a response and an

1 objection to the document request, and in connection with that
2 response, the trustee identified the documents in the
3 repository that had previously been produced that would be
4 responsive to Requests 2, 5, 6, 9, 12, 17, 18, and 19.

5 The trustee also agreed and did conduct additional
6 searches of documents that were not in the repository and made
7 an additional supplemental production in response to Requests
8 10, 11, 15, and 16. The trustee conducted searches with
9 respect to Requests 2, 3, 17, 18, and 19, and determined there
10 were no additional responsive documents.

11 The trustee objected, but offered to meet and confer
12 because the requests were too broad to conduct a reasonable
13 search with respect to 4, 5, 6, 7, 9, and 12, and although
14 that was served on May 1st and filed in the MDL, here we are
15 on May 29th and no one has contacted our special counsel
16 Harris Beach, Mr. Fern, to have a meet-and-confer with respect
17 to those documents.

18 So, I think the point -- I'm going to try to outline
19 six specific points that I think you should be considering in
20 deciding prudentially whether this deposition should go
21 forward, but the point I want to make with respect to (b.) is
22 that the trustee has been fully responsive with respect to the
23 document requests, has conducted additional searches and
24 produced documents that were not in the repository, has
25 specifically identified documents in the repository and has

1 offered to meet and confer with respect to additional requests
2 and, in fact, has only objected to four requests in their
3 entirety, which, again, there's been no motion to compel, no
4 meet-and-confer at all almost a month later with respect to
5 any of those.

6 So, what are the six reasons why the trustee thinks
7 the Court should grant his motion for protective order? I
8 think it starts with the question that you asked in connection
9 with the FDA, which is we're a nonparty. This is not a
10 request to take a 30(b)(6) deposition of a party defendant.
11 In fact, the Tennessee Clinics have agreed not to name Mr.
12 Moore as a party in any case other than for comparative fault
13 purposes.

14 The plan, as the Court knows, has been approved and
15 goes effective June 4th. The automatic stay, all it provides,
16 that there are no direct claims against NECC that are going to
17 be brought here. So, this is a nonparty situation which
18 requires the Court, I believe, to carefully balance the
19 various factors that I'm hoping to lay out for you to decide
20 whether for a nonparty this makes sense and we would submit
21 that it doesn't.

22 The first reason it doesn't make sense is that there
23 has been, as I just laid out for the Court, an extensive
24 document production and a continuing offer to meet and confer
25 with respect to additional documents. So, there's been no

1 stonewall with respect to document production at all.

2 Second, I don't believe that the Tennessee defendants
3 have been diligent in pursuing the documents. As I've just
4 pointed out, it's been almost a month and we've had no meet-
5 and-confer. I think, as the PSC pointed out in its papers to
6 the Court, the discovery has been open in this case since
7 September of last year and here we are, essentially, in June
8 and we're first dealing with this now. I don't think they've
9 been diligent in pursuing it.

10 I think, third, is really the very strong and
11 practical considerations that I think are right in accordance
12 with the rule, which is that NECC has no employees. It has no
13 officers and directors, except for Mr. Moore, who under the
14 plan is the sole officer and director and post-confirmation
15 officer. So, therefore, the only people it could approach to
16 testify on its behalf with respect to these matters are these
17 former employees, who, as you'll find out very shortly in
18 connection with all these motions, do not consent to testify.
19 So, the trustee literally has no one who will consent to
20 testify -- they're all taking the Fifth Amendment -- on his
21 behalf.

22 Now, let's look at the trustee. He was appointed
23 four months after this facility was shut down. So, he has no
24 personal knowledge of anything that they want to ask about.

25 Now, they have made quite clear in their papers, they

1 don't want to take his deposition. They want to take somebody
2 else's deposition. And our point, very simply, is there isn't
3 anybody else. The people who could testify will not consent
4 to testify. There really is no witness. And so, that's a
5 practical matter for a nonparty that you really need to think
6 about, I think.

7 But, more importantly, what are the alternatives?
8 What alternative means are there to try to force this
9 deposition where there is no witness? And I would submit
10 there's at least three that should be considered here:

11 One is, what stipulations can they reach with the
12 plaintiffs regarding issues, such as NECC supplied the
13 medicine. My understanding is the plaintiffs are prepared to
14 agree to that. There are other stipulations that they could
15 agree to that might obviate the need for NECC to be deposed
16 and, again, the practical problem is there's no one to depose.
17 So, stipulations need to be considered.

18 Expert testimony. You know, there's a complaint that
19 documents are not sufficient, but if you look at the
20 Tennessee's objection, they say the Tennessee Clinic
21 Defendants need testimony and documents to prove NECC's
22 deviation from the standard of practice in manufacturing and
23 distributing the medication that caused the plaintiffs'
24 injuries.

25 To me that's classic expert testimony. Experts can

1 look at documents. They can read all the reports that Mr.
2 Glass referred to. They can read all the documents that we
3 specifically identified in our response and objection and they
4 can provide the testimony that they say they need for
5 comparative fault purposes, it seems to me.

6 And then, finally, they're going to have the benefit
7 of an adverse inference, presumably, if, as I understand it,
8 the various former employees of and officers and directors of
9 NECC take the Fifth Amendment.

10 So, the question as you're making this balance is
11 given all of those available alternative means, do they really
12 need to push forward with a deposition where, as a practical
13 matter, there is no witness who could be deposed and we're
14 being fully cooperative with respect to document production,
15 and they have not diligently pursued it.

16 And last and I think maybe importantly is cost. As
17 the Court may know and as I think I said just a minute ago,
18 the plan is effective June 4th, and one of the realities of
19 the plan being effective June 4th is that part of the
20 agreement with the insurers in this case is that their
21 requirement to provide defense costs stops on June 4th. So,
22 anything that happens after June 4th is coming directly out of
23 the victims' pockets because that's the only source for
24 payment, and I think when you're balancing this --

25 THE COURT: When you say that, Mr. Gottfried, you

1 mean it's coming out of the trust fund?

2 MR. GOTTFRIED: Yes.

3 THE COURT: Okay.

4 MR. GOTTFRIED: Exactly. Exactly, your Honor.

5 So, given that they have not been diligent, given
6 that that is going to happen, the burden and expense here
7 should not be shifted to the victims to prove this where
8 there's alternatives, where there's no real witness, where
9 we're a nonparty. It just seems to me that the protective
10 order here under the facts of this case makes sense.

11 They cited some cases to the Court. Some don't even
12 involve 30(b)(6) depositions. Some don't involve nonparties.
13 This is a unique case. I agree, it's a sui generis case, but
14 under the facts of this case, to make the trustee somehow go
15 in and maybe look at documents and then testify based on his
16 review of documents at the expense of the victims, where they
17 and their experts could look at the very same documents,
18 doesn't seem correct.

19 In addition, obviously, Mr. Moore has the issue where
20 some of the information he has is attorney/client privilege
21 and it is work product which he used to achieve the \$200
22 million in settlements that were achieved in this case.

23 So, we would urge based on those six factors that the
24 Court grant the motion for protective order.

25 THE COURT: So -- and, as you say -- obviously, you

1 cited cases that were supportive of your view and the other
2 side cited cases that were supportive of their view of it.
3 And as is typical with 30(b)(6), sometimes you have people
4 with knowledge, sometimes you have people not with knowledge
5 and you have to feed them the knowledge, so to speak, which is
6 specifically allowed by the 30(b)(6) procedures.

7 So, you're saying I should reconcile the two
8 competing views in accordance with what you're saying or
9 through the alternative methods?

10 MR. GOTTFRIED: Correct. I think -- again, I think
11 you have to balance the interests, okay? And I think where
12 there are alternative means, where the expense in this case
13 because of their lack of diligence, in particular, is going to
14 fall on the victims, where the trustee has no personal
15 knowledge, where they are going to get, in particular, the
16 benefit of the adverse inferences because the people who you
17 would ask do not consent to testify, which is what 30(b)(6)
18 requires, they don't need this deposition. I think the
19 reality here is they don't need this deposition. It's
20 unnecessary. It's an unfair burden on the estate. And I
21 think for all those reasons, you should find that the balance
22 here favors the protective order in this case.

23 Again, we're making the documents available. We're
24 not saying they don't get discovery, but the question I would
25 ask them is, Where have you been for 30 days on the meet-and-

1 confer?

2 THE COURT: All right.

3 MR. GOTTFRIED: It makes it seem like this is more of
4 a tactic, quite frankly, than a good-faith effort that they
5 really need this.

6 THE COURT: Yes.

7 MR. GIDEON: C.J. Gideon on behalf of the party that
8 opposes this motion for protective order, and I'm going to
9 refrain from the hyperbole.

10 I thought that at the outset that the gentlemen who
11 was just speaking was saying this isn't about document
12 production and then he spent two-thirds of his presentation
13 faulting us for not challenging the document production.

14 What I'm here to address with the Court today is our
15 request that we have somebody or several people designated by
16 NECC under Rule 30(b)(6).

17 As the Court knows quite well from all the papers
18 that have been submitted, there is no exception in 30(b)(6)
19 for a bankrupt entity. There's also no exception in 30(b)(6)
20 for a company that says this is just, frankly, inconvenient or
21 it's going to cost something. It's a policy choice that's
22 been made to utilize and permit the utilization of this method
23 for the collection of information.

24 We wish to use it principally because it provides us
25 with an excellent means to put questions to an entity that

1 cannot assert the Fifth Amendment and require a response by
2 the entity that everybody in this room knows is responsible
3 for unleashing at least three lots of toxic pharmaceuticals
4 throughout the country.

5 Now, looking at the high watermark of all the
6 briefing that's been done and submitted to you, I would take
7 the brief that was submitted on the 27th by the invoking
8 defendants, the response brief this Court permitted, and
9 there's one case in there that just fits this like a glove,
10 and it's *City of Chicago vs. Reliable Auto Parts*, same set of
11 circumstances. The City of Chicago was proceeding against
12 Reliable Auto Parts for defrauding the city on maintenance and
13 repair for a number of years. All the owners and operators
14 all were facing criminal liability. All said they were going
15 to take the Fifth. The Court, the senior U.S. district judge,
16 still required the NECC in that case to designate an
17 individual to answer the questions and disposed of all of
18 those arguments quite quickly.

19 The second substantive point I would like to make is
20 the inadequacy of the submissions to you to support the
21 argument that was just made. The declaration of the trustee
22 is approximately three pages long. It is incorporated word
23 for word in the first four pages of the memorandum. Even the
24 tense is the same.

25 Not one time in the declaration or the brief do they

1 ever say that they have contacted a former employee or made
2 any effort to speak to anybody in particular. They simply
3 state that these former officers and directors will not be
4 available, but there is no reflection that they had made any
5 effort at all to contact anyone who has not been indicted by
6 the United States.

7 14 people were indicted December 16th, 2014. At the
8 time Brigham & Women's Hospital did an inspection of NECC in
9 2012, NECC reported it had 75 employees. There is no
10 indication that the trustee or trustee's counsel has made any
11 effort to contact any of these people to say that you're
12 compensated reasonably for your time, which I suspect would be
13 less than the charges by trustee's counsel. Will you take the
14 time to be prepared to answer these specific questions?

15 Linda Pineau is a former employee of NECC. She was
16 deposed in Virginia in the Virginia litigation. We've tried
17 our best, those of us who are accused of being non-diligent,
18 to get that transcript, but we can't get it. We tried our
19 best to find other individuals who used to work for NECC, but
20 they're much more clearly available to them.

21 So, when you look at the rule, when you look at the
22 text of the rule, when you look at a recent case submitted to
23 the Court for consideration by the invoking defendants, the
24 answer, I respectfully submit, is rather clear. They should
25 be required to designate someone to answer those specific

1 questions, not just for us, but for everybody else in this
2 litigation.

3 THE COURT: Anyone else wish to speak to this issue?

4 MS. JOHNSON: Yes, your Honor.

5 THE COURT: Yes.

6 MS. JOHNSON: A few things.

7 I start, again, with the observation from the PSC's
8 perspective, this really is all about the documents. There is
9 a wealth of documents that have been produced. We understand
10 the trustee is making additional production of documents or
11 has made additional production of documents in response to
12 this. There is a wealth of information available about NECC
13 that's available to the Tennessee defendants and that is,
14 again, a logical starting point.

15 I will make a couple of observations moving from that
16 point:

17 First, given the PSC's hand-to-hand involvement with
18 the trustee, the PSC's own efforts to develop cases against
19 NECC, all of which led, by the way, to a significant
20 settlement where NECC paid money into a pot for victims, it is
21 unclear from the PSC's perspective that there really is a
22 logical person that could do this depo. So, when Mr.
23 Gottfried says he's not sure who it would be, we agree with him.

24 Now, sure, 30(b)(6), you could take the time to
25 educate people. You can put documents in front of your own

1 former employee and educate that person. You could do a depo
2 that way, I suppose, but let's talk about costs for a minute.

3 Insurance defense coverage for NECC ends on June 4th
4 and I'm looking at the letter that the trustee sent me last
5 night from its own insurer informing the trustee very loudly
6 of that fact.

7 If a deposition goes forward -- and we don't think
8 that it should -- if it goes forward, the St. Thomas Clinics
9 should have to pay the costs associated with that deposition.
10 That would include, perhaps, Mr. Fern's time, special counsel
11 to the trustee, to the extent he would need to be involved in
12 preparing a witness for 30(b)(6). It would include things
13 like a court reporter, the cost of lunch, reserving the
14 conference room. It should include Tennessee Clinics having
15 to pay for any time incurred by the trustee, who I suppose at
16 that point, technically, his title changes. He would be the
17 post-confirmation officer, but Mr. Moore's time should be paid
18 for. It is not a small thing to talk about having the tort
19 trust pay these costs. It is a real hit to victims, and both
20 Mr. Moore and the PSC feel very strongly those costs need to
21 be minimized.

22 Finally, I can't help but note that all of the
23 defendants here before you that are seeking to -- seeking
24 motions to quash or protective orders have all contributed to
25 the bankruptcy settlement, and as part of the negotiation for

1 that settlement and the releases that have now been confirmed
2 by Judge Boroff, there was an agreement that the discovery
3 that would need to be done was only the discovery that was
4 necessary to establish comparative fault defenses or the
5 defenses and liability of other entities.

6 Now, I do think that much of what's being fought
7 about here fits into that bucket. So, I'm not suggesting they
8 shouldn't have to do anything, but I do think that the
9 structure that was contemplated there and very carefully
10 negotiated always had at its root the thought that these
11 entities should have to produce information sufficient for
12 discovery, but should not have to do more than was necessary
13 to adequately provide the information necessary for
14 comparative fault defenses.

15 So, that brings me back, your Honor, to where I
16 started, which we really do think the documents here are the
17 logical starting point and, hopefully, the ending point,
18 particularly as to NECC.

19 THE COURT: Does anyone else wish to speak to it?
20 Yes.

21 MR. GIDEON: One last -- couple points.

22 Our notice of deposition went out in April, set the
23 date for May 13th. Today is the first time there's been any
24 emphasis placed in this response on when the insurance
25 carriers would quit paying for defense costs. That's

1 particularly one point that could have been resolved very
2 quickly if they had said, Let's go ahead and do this
3 deposition before June 14th.

4 The offer of lots of documents, we addressed that.
5 It is specifically and squarely rejected in the *In Re:*
6 *Vitamins Antitrust Litigation* case, cited at Note 46 in our
7 response.

8 And in terms of what it is that we're trying to
9 establish, let me just give you a vignette that shows how
10 clearly this deals with the comparative fault issue.

11 Medical Sales Management, which we're told is a
12 separate entity, separate and apart from NECC, had salespeople
13 who came to Tennessee and with the Tennessee physicians and
14 nurses made a representation that all the product they sold
15 was compliant with USP 797, the gold standard for safety, and
16 that all of their processes here were compliant with USP 71.

17 We want to have someone from NECC confirm that those
18 were the representations that were being made, that under
19 their contract with NECC and Medical Sales Management, the
20 director of pharmacy for NECC had the final right to approve
21 the content -- the content of the representations; that Mr.
22 Barry Cadden was the one who set the pricing and established
23 that if they had followed -- if they had followed the rather
24 clear requirements of USP 797 and 71, this never would have
25 happened. It could not have occurred. That's an example why

1 we want to have somebody who cannot assert the Fifth Amendment
2 answer those very, very important questions.

3 THE COURT: All right. Thank you.

4 And, yes -- and, actually, Mr. Gottfried, I had a
5 question for you. This may sound uninformed because it's a
6 long time since I was involved in bankruptcy litigation.

7 MR. GOTTFRIED: Okay.

8 THE COURT: But I thought sometimes there was money
9 set aside to pay for expenses after the confirmation of the
10 plan, and if there are no such --

11 MR. GOTTFRIED: There is.

12 THE COURT: Okay.

13 MR. GOTTFRIED: There is, your Honor, but the point
14 on that is quite clear, that any money that's not used goes to
15 the tort trust.

16 THE COURT: I see. So, there's a reserve, but you
17 would like that reserve to go to --

18 MR. GOTTFRIED: We would like as much money to go to
19 the victims as possible after all of the legitimate
20 administrative expenses are paid.

21 THE COURT: But right now it's not in the trust fund.
22 It's in a reserve to pay for whatever expenses, additional
23 legal costs or things like that?

24 MR. GOTTFRIED: I'm not sure that's --

25 THE COURT: Yes.

1 MS. JOHNSON: So, just to -- I knew nothing about
2 bankruptcy law coming into this case, your Honor. So, I have
3 forced myself to distil it into plain English. So, the way I
4 think about it, if it's helpful, is there have been
5 contributions made to a pot. The trustee will then from that
6 pot pay fees and expenses off the top. That includes payments
7 of nontort creditors, as described in the plan. Not all of
8 those are paid, but those that are paid get paid first. The
9 money then pours over into the tort trust and victims are then
10 paid out of the -- tort victims are then paid out of that tort
11 trust. So, there's no reserve, as I think your Honor may be
12 contemplating where a designated amount of money is set aside
13 specifically to pay expenses, but it is the case that fees and
14 expenses are dealt with first and anything remaining is then
15 poured over into the tort trust.

16 THE COURT: Thank you.

17 MR. GOTTFRIED: It's certainly the trustee's goal for
18 a lot of tax advantages for the tort victims to get this done
19 this year. So, a couple of -- if that answers your question,
20 a couple of quick points.

21 THE COURT: Yes.

22 MR. GOTTFRIED: One, again, this is a balance test,
23 and the rhetorical questions that were asked are, you know, we
24 want a witness to say this. Well, they're going to have the
25 Fifth Amendment inference with respect to those questions.

1 And so, the question is under these circumstances, do they get
2 something else in addition to that Fifth Amendment inference?

3 And what I'm trying to ask the Court to also consider
4 is, there is nobody else to give that testimony. There is no
5 witness who is going to testify who is knowledgeable of those
6 facts who can answer those questions about what representation
7 was made. The answer is going to be, "I don't know," and then
8 they have the Fifth Amendment inference.

9 So, the question is, under these circumstances, given
10 the costs, are they entitled to the perfect in proving
11 comparative fault against a nonparty or are they entitled to a
12 balance? And I'm suggesting that the balance here is clear,
13 that they can enter into stipulations. Their expert witness
14 can review the documents and testify to conclusions. They
15 have the Fifth Amendment inference.

16 There is no serious question that the jury is going
17 to understand that the medicine here was sold by NECC. And
18 the real question is: What more do they need for comparative
19 fault than to tell the jury for the jury to understand that
20 they bought tainted medicine?

21 At the end of the day, that's going to be an
22 established fact and there are multiple ways they can get that
23 fact. How it was tainted, why it was tainted, who
24 particularly tainted it, is all irrelevant. It's that they
25 got that medicine.

1 So, I think when you really drill down here -- sure,
2 in the ideal world, they would like one of these folks to
3 waive their Fifth Amendment and talk about all that stuff, but
4 that's not going to happen and the trustee can't make that
5 happen, but what they do have is sufficient for proving
6 comparative fault. That's all they're entitled to. This is a
7 nonparty and the money is coming out of the victims' pockets.
8 I urge you to grant the protective order.

9 MS. JOHNSON: I have one point that I think I owe Mr.
10 Gideon a response on something, because I heard him say that
11 he tried to get his hands on the Linda Pineau deposition that
12 was taken in Virginia. The PSC has never been asked for that
13 deposition.

14 I don't know sitting here today whether I would be
15 allowed to produce it, given the protective orders that may be
16 in place in Virginia and in the agreements in the Virginia
17 settlement, but, in any event, we've not been asked for that
18 before. So, we will certainly look into whether or not we're
19 in a position to produce that.

20 THE COURT: All right. So, moving on to the next
21 batch. We have quite a few motions.

22 MS. JOHNSON: I think the next one on our agenda
23 would be (c), which would be the motion for protective order
24 and motion to quash deposition notices by what -- the group
25 that's calling itself, "the invoking defendants."

1 MR. RABINOVITZ: Your Honor, I'm going to start the
2 argument, if it please the Court.

3 There are a few things that I want to highlight for
4 you that are in our briefs that we filed.

5 The first is, let us not forget that the discovery
6 stay which was, as the PSC just pointed out, an integral part
7 of the negotiations. The discovery stay says that the only
8 thing that's permissible in discovery are things that are
9 relevant to the prosecution or defense of third-party claims,
10 and in this context, what that means is questions that are
11 designed to discover fault, and when you start to talk about
12 questions that relate to fault, that automatically triggers
13 legitimate Fifth Amendment concerns. What could be more
14 triggering than that, questions about fault to people who have
15 been --

16 THE COURT: I didn't understand that anyone was
17 questioning the individual defendants' right to assert the
18 Fifth Amendment. Or am I missing something?

19 MR. RABINOVITZ: You are missing a nuisance, I think,
20 your Honor, which is that they are absolutely -- the Tennessee
21 parties are absolutely trying to force the invoking parties,
22 as they're called in our brief, to show up for a deposition
23 and be videotaped and they have --

24 THE COURT: Invoking their Fifth Amendment?

25 MR. RABINOVITZ: Well, that's their first starting

1 point. Under their theory of what should happen is first they
2 want to videotape them invoking and then they want to come
3 back to the Court and argue about whether the invocation was
4 proper question by question.

5 And what we did in our meet-and-confer is we said,
6 Why don't you give us the questions in writing? That is
7 permissible under the Rules. And then we can take it question
8 by question and we can hash that all out before the Court and
9 there will be no videotaping if it's not necessary.

10 But the point I'm trying to make is that the
11 discovery stay means that the only questions that can be asked
12 are questions that the invocation is absolutely legitimate and
13 must be upheld and if that's the case, your Honor, then
14 videotaping defendants taking -- invoking their constitutional
15 rights is oppressive. It's burdensome. It's wasteful in
16 terms of cost. Quite frankly, it's outrageous.

17 And when you factor in this blanket approach that
18 they're talking about that they've argued in their
19 pleadings -- we're not asking for a blanket approach. The
20 fact of the matter is that the stay says these are the only
21 relevant questions that can be asked, and the fact of the
22 matter is that means, by definition, those questions trigger
23 legitimate Fifth Amendment concerns.

24 And, with all due respect to everybody who has argued
25 otherwise, that's the end of the ball game right there, your

1 Honor. It's not that we're asking for a blanket approach.
2 It's that the stay says what it says and, by definition, those
3 questions are legitimate Fifth-Amendment-invoking questions.

4 And said another way, all you have to do is read the
5 affidavit that was filed by the U.S. Attorney for the District
6 of Massachusetts in connection with the FDA motions that you
7 just heard and it is full of examples of how this Fifth
8 Amendment concern as to all these invoking parties are
9 extremely real.

10 And let's not forget that we are talking about the
11 most valued principle in American jurisprudence, is the Fifth
12 Amendment.

13 And I must comment on something that Mr. Gideon said
14 because it was very telling. What Mr. Gideon said was that he
15 wants to aid in his presentation, trial presentation, and
16 that's the issue, as Mr. Gottfried was commenting on as well.
17 The issue for your Honor is to balance the most important
18 right an individual in the United States of America has under
19 the Constitution versus the preference of other parties in a
20 civil matter to present their case in the most prejudicial way
21 that they can, and when you view the issue that way, your
22 Honor, again, it should be absolutely clear that there's only
23 one decision here, which is to say to these parties who want
24 to force these individuals, many of whom, if not all, have
25 contributed millions and millions of dollars to this fund that

1 is going to be available to the victims, prevent them from
2 being videotaped for the strictly harassing purpose that this is.

3 I also, your Honor, wanted to draw to your attention
4 a particular line from -- a quote from the United States
5 Supreme Court, the *Hoffmann* case, that was quoted in our
6 papers, and in that case the Court said that, "The immediate
7 and potential evils of compulsory self disclosure transcend
8 difficulties the exercise of privilege may impose on society,"
9 and the quote, to quote it completely, says, "in the detection
10 of prosecution of crime," but that principle is just as
11 applicable in this civil context as well, and that's the
12 reality of the situation, is that the Fifth Amendment concerns
13 and the Fifth Amendment rights trump often -- trump concerns
14 in a civil case, and this is -- if this case doesn't do it,
15 what case does?

16 Again, the facts in the U.S. Attorney's affidavit
17 make it clear that this is a very real concern and there's
18 absolutely no legitimate reason for the Tennessee parties to
19 be able to film people invoking the Fifth Amendment when they
20 can get that evidence and they can get that adverse inference
21 in almost identical form. The only difference is that they
22 don't have the videotape, but it will be stipulated to at
23 trial, I'm sure. There'll be an adverse inference drawn at
24 trial and they don't need that, and it's telling that they
25 wouldn't give us the questions by questions, because they know

1 that there are no questions permitted by the discovery stay
2 that don't trigger legitimate Fifth Amendment concerns and
3 they wouldn't agree to that and that's why, I submit to this
4 Court.

5 And if the Court has any questions, I'd be happy to
6 -- I'm sorry. My colleague wants to makes a point.

7 THE COURT: Okay.

8 MR. O'HARA: If you will, Chris O'Hara.

9 I wanted to circle back with a point that Mr. Glass
10 made earlier, that there is a complete overlap, not
11 questionable, but a complete overlap between the criminal
12 action and the civil matter here. So, there isn't any
13 question about whether the Fifth Amendment invocation is
14 proper.

15 Second, the adverse inference, which is the sole
16 basis upon which they seek to have discovery from the invoking
17 defendants is already amply provided to them in all of the
18 discovery responses that we've given in writing already
19 invoking in great detail in requests for admission, in
20 interrogatories and in document requests, all of which are
21 available to the Tennessee Clinic Defendants, to the St.
22 Thomas Entities and to the Premier defendants in order to get
23 the adverse inference that they are seeking for purposes of
24 comparative fault, and the depositions add nothing because the
25 -- they already know and have been told that the invoking

1 defendants will invoke given the clear existing criminal
2 proceeding that completely overlaps any possible area of
3 inquiry.

4 So, I think under those circumstances, when you
5 balance those factors, where they have the adverse inference
6 already from us, the depositions are not only unnecessary,
7 they are -- indeed, appear to be for a different purpose, from
8 our perspective.

9 THE COURT: And you gentlemen have been speaking
10 about all the defendants as one group, but Ms. Conigliaro-
11 Cadden is slightly different in that she hasn't been indicted.

12 MS. PEIRCE: Your Honor, Michelle Peirce. I
13 represent Ms. Cadden.

14 You're right that she is fortunate not to be in that
15 group arising out of this terrible tragedy, but in terms of
16 the principles that apply, she falls squarely within the same
17 principles. The indictment -- I'm sure your Honor has had a
18 chance to read it -- is a sweeping indictment. The government
19 in a recent affidavit provided by the U.S. Attorney has made
20 clear that they're still investigating.

21 So, the point for Ms. Cadden is that it is for
22 reasonable for her for all of the same reasons to protect
23 herself and invoke, as she has in written discovery.

24 If I could add one point that applies to her and to
25 my colleagues who have spoken well to the fact that at a

1 deposition, they would be required to invoke and I believe the
2 Judge, were you forced to go through this process, which I
3 think is unnecessary, of looking question by question, for all
4 the reasons my colleagues said, you would agree that given the
5 broad right to invoke, whether it's a direct admission or
6 could be a steppingstone in someone proving a case against
7 them, I think you would agree for the reasons my colleague
8 said that the invocation would be proper question by question,
9 not because it's blanket, but because of the unique
10 circumstances here.

11 What I wanted to add is that that's balanced against
12 their right to a fair trial. I also represent Mr. Cadden, and
13 I do want to emphasis. It's not just the important right to
14 invoke the Fifth Amendment. The point is every time something
15 like that happens in this case, at the arrests, there is a ton
16 of publicity and there is a very real risk and, in fact, I am
17 concerned that we've already crossed the line of that risk
18 with the publicity at the arrests, that they will not be able
19 to get a fair trial, and to allow each of them to be put in an
20 unnecessary situation where they have to invoke, as we all
21 know they will, and as I believe your Honor would uphold
22 question after question, as others have said, there is a real
23 risk that those transcripts could become public, doesn't even
24 matter. Those trials are going forward ahead of the criminal
25 trial. And so, what you will have is another media storm of

1 each of these individuals, whether on paper or on video,
2 invoking. And the balance of the need or preference for an
3 attractive piece of evidence -- which I understand. I
4 understand why the clinics would prefer that, but it is so
5 wildly outweighed by my clients' need and right to a fair
6 trial, and they can get everything they need on paper, that to
7 me it's a balance that drops quickly in the invoking
8 defendants' favor.

9 THE COURT: All right.

10 MR. GIDEON: We respectfully disagree. Let me --

11 MR. RABINOVITZ: I'm sorry. I apologize. We have
12 one more counsel who would like to speak.

13 THE COURT: All right. It makes sense to hear from
14 all the invoking defendants.

15 MR. KLARFELD: Your Honor, can you hear me okay?

16 THE COURT: Yes.

17 MR. KLARFELD: I represent GDC, which is one of the
18 affiliated defendants, the so-called affiliated defendants.
19 I'm not sure if your Honor wants to hear our piece of this
20 argument now or --

21 THE COURT: That's fine.

22 MR. KLARFELD: Okay. I'm actually here to speak on
23 behalf of GDC and the other so-called affiliated defendants,
24 MSN and Ameridose.

25 Our position -- and briefly at the end Steve Higgins,

1 who has also filed a motion --

2 THE COURT: I'm sure Mr. Higgins doesn't want you to
3 speak briefly.

4 MR. KLARFELD: Fair enough.

5 The affiliated defendants find themselves in a
6 slightly different position and their position is actually
7 quite similar to what Mr. Gottfried outlined.

8 There are really two categories of a potential
9 witnesses who could speak on behalf of the affiliated
10 defendants in a 30(b)(6) context and those are the owners, the
11 individuals who already invoked who will invoke if ordered to
12 testify in a 30(b)(6) capacity as well because it's the same
13 Fifth Amendment concerns that they would have in that context.
14 Not that the company has a Fifth Amendment right, but the
15 individuals who would be called upon to testify would.

16 The other group of potential witnesses are other
17 employees or former employees and we have, in fact, reached
18 out to them. We have, in fact, tried to get -- tried to see
19 if they would consent and by the plain terms of Rule 30(b)(6),
20 as the requesting defendants themselves recognize, that
21 requires consent, and those individuals have refused their
22 consent and they've refused their consent for any number of
23 reasons, not the least of which -- and this ties into Mr.
24 Higgins -- not the least of which is that they, too, have
25 Fifth Amendment concerns and their Fifth Amendment concerns in

1 the case of Mr. Higgins has led him to tell us that he will
2 invoke his Fifth Amendment right, and the other potential
3 prospective individuals who could otherwise testify on behalf
4 of the company who have refused to do so for the same reasons.
5 We have made an effort to do that and we have actually put in
6 our papers that we made that effort.

7 There simply is no one to testify on behalf of the
8 affiliated defendants, either because they have already
9 invoked their Fifth Amendment or because they are refusing to
10 consent, which is their right to do.

11 With respect to Mr. Higgins specifically, he in many
12 ways is in the same boat as Ms. Cadden. He's a nonparty,
13 which is unlike her, but he has not been indicted, but that --
14 you know, that said, he still has legitimate concerns that he
15 could be indicted. As the U.S. Attorney's affidavit makes
16 clear, there is still ongoing investigations and there is no
17 reason to believe that he could not be the target of those
18 investigations. As a result, he has the same Fifth Amendment
19 concerns that the other invoking defendants have, with the
20 added piece that he is a nonparty.

21 If you have no questions for me, I think that covers
22 where the affiliated defendants --

23 THE COURT: I think there are also -- besides the
24 substantive issues, there's a motion for joinder at (d.) by
25 Ameridose and (e.) by GDC. I assume there's no opposition to

1 those.

2 My only question about them is that they're
3 corporations and they're seeking to join the motions that were
4 filed by individuals and the rights are, obviously, slightly
5 different in terms of invoking the Fifth Amendment, how you go
6 about invoking the Fifth Amendment.

7 MR. KLARFELD: Right, I agree with your Honor. As a
8 corporation, the companies -- they can't invoke Fifth
9 Amendment and we're not suggesting that they can. What we're
10 suggesting is there are only two categories of people who
11 could testify on their behalf as a 30(b)(6) representative.

12 If one of the invoking defendants were called upon to
13 testify, that person would still have his or her individual
14 right to invoke the Fifth Amendment and would be forced to
15 invoke the Fifth Amendment whether testifying in an individual
16 capacity or on behalf of the company because it's still going
17 to fall back to them. So, yes, the company standing by itself
18 cannot invoke the Fifth Amendment and we're not suggesting
19 otherwise.

20 The one other piece that I think is important here,
21 Mr. Gideon referenced the case of *City of Chicago vs.*
22 *Reliable* and I think that is a very important case. One of
23 the rules of law that comes out of that case is that a person
24 who would otherwise invoke the Fifth Amendment cannot be
25 forced to give his or her information to educate another

1 person so that that other person could testify as a 30(b)(6)
2 witness. So, even if they were correct that we should go out
3 and scour the earth to find someone who could testify and
4 educate that person, there's no one to do that because that
5 person, presumably, could only be educated by someone who will
6 otherwise invoke the Fifth Amendment and that person can't be
7 forced to waive his or her Fifth Amendment rights to educate
8 someone else to testify on behalf of the company, which really
9 just takes us back to there's no one to testify on behalf of
10 the various companies.

11 THE COURT: And with respect to Mr. Higgins, because
12 he's in a slightly different posture than the other potential
13 deponents, if I understood correctly, they're also seeking
14 documents from him; is that correct?

15 MR. KLARFELD: Yes, your Honor. And I want to be
16 clear, your Honor. I'll let you ask your question, but I
17 think --

18 THE COURT: No. No. Go ahead.

19 MR. KLARFELD: We have not moved to quash that
20 component.

21 THE COURT: Okay.

22 MR. KLARFELD: But to be clear, what they have --
23 what they have requested are his own personal documents. So,
24 something like his driver's license, I suspect we'll be able
25 to come forward with. Whether he has other documents in his

1 individual capacity that he could produce, I don't know that
2 he does, and we have already produced the responsive documents
3 that we have on behalf of GDC, which is his employer. So, I'm
4 not sure that there's --

5 THE COURT: But you need to look.

6 MR. KLARFELD: Of course, we need to look, but I just
7 -- we haven't moved on that --

8 THE COURT: You haven't, okay. All right.

9 Do you want -- we'll go to the PSC and then you'll
10 get to respond to everybody.

11 MS. JOHNSON: Mr. Moriarty for Ameridose wishes to --

12 THE COURT: Okay.

13 MR. MORIARTY: Sorry, your Honor. I was forced to
14 the back of the bleachers today.

15 THE COURT: Well, you can actually sit in the witness
16 box.

17 MR. MORIARTY: No, I think I'm fine right here. You
18 don't want to do the Tennessee Clinic lawyer's job for me.

19 Our joinder, which was Docket No. 1824, had to do
20 with the Fifth Amendment issues and the other objections that
21 were made by the invoking defendants at the time. We have
22 subsequently filed a separate motion that isn't ripe and ready
23 to be argued today. So, on the issues that have already been
24 argued, I don't have anything to add to what Mr. Gottfried,
25 Rabinovitz, O'Hara and Klarfeld have already said, except for

1 one thing, and I think this is an issue under the scope of the
2 motion that's pending.

3 The notion that someone following the settlement of
4 this case and everything that that entails and all these Fifth
5 Amendment issues can educate nonmanagerial employees, former
6 employees of these companies, find them, get them to consent
7 and educate them, is, to put it mildly, very unreasonable.

8 To follow up on Mr. Klarfeld's point, you just can't
9 educate non-managerial employees about these kinds of topics
10 with the documents available, the Fifth Amendment issues, and
11 all the other issues that are going to be coming up in the
12 next few weeks. So, it's not so easy. And the law requires
13 that any 30(b)(6) witness who is educated because they can't
14 meet all the requirements, you have to really educate them.
15 You can't just put somebody in the box anymore and have them
16 say, I don't know, I wasn't there, I don't understand these
17 documents, I don't have these documents available. You can't
18 do that anymore.

19 So, the entities, like MSN, GDC and Ameridose, are in
20 a real bind with their ability to find and get consent and
21 identify witnesses who are not going to invoke the Fifth
22 Amendment. Thank you, your Honor.

23 THE COURT: So, I have read the motion that was filed
24 on May 22nd. Obviously, the time to respond has not gone by
25 yet, but what I would suggest is that if there's something

1 else you would like to address, since we're all here. I,
2 obviously, won't rule on it until I get a written opposition
3 or if anyone does oppose it, they're welcome to do it orally
4 here today. So, is there anything else that you would like to
5 say in support of that motion?

6 MR. MORIARTY: Well, sure. We must have said 20
7 times in those pages that Ameridose did not manufacture,
8 compound, dispense, disseminate this drug and I'm --

9 THE COURT: And as opposed to the other movants, you
10 were raising quite a strong relevance objection?

11 MR. MORIARTY: Well, yes, it's relevance, it's
12 liability, it's causation. And as I understand Tennessee
13 products liability and comparative fault law, under the *Owens*
14 case that somebody mentioned earlier, Ameridose can't be
15 carved out separately anyway on a Tennessee jury form for a
16 Tennessee jury to say Ameridose was at fault. And so, there's
17 another 20 percent off the St. Thomas Entities or the
18 Tennessee Clinic Defendants. It's one single share.

19 As Mr. Gottfried and others have already pointed
20 out -- as a matter of fact, as Mr. Gideon pointed out, and I
21 quote, "There is an entity that everyone in this room knows
22 unleashed three toxic lots of methylprednisolone acetate."
23 It's pretty clear that NECC made this product.

24 There have been a bunch of depositions taken in the
25 Tennessee cases. Ameridose isn't implicated in any of them.

1 The St. Thomas Entities didn't buy this drug at all from
2 anyone and the Tennessee Clinic Defendants didn't buy it from
3 Ameridose.

4 So, the farther afield you get from the true relevant
5 inquiry for the purposes that they need it in Tennessee, the
6 more costly, the more difficult, and the more hurdles are
7 thrown up. All for what? When you have no causations for an
8 entity that didn't make the product and you have no liability
9 beyond this one single share theory. It's just too expensive.
10 It's too much digging and it isn't warranted, and I think Mr.
11 Gottfried pointed out -- and I left these other notes in the
12 back -- that, you know, you get all these people who are going
13 to have a right to be at these depositions that cost money.
14 People are going to be applying to the tort trust for we need
15 fees for this and fees for that, because the insurance
16 companies aren't going to be paying for it anymore. So, it's
17 just too problematic and it isn't necessary.

18 And until I have something in writing or something
19 that these Tennessee defendants want to talk about today to
20 reply to, that's about all I can say.

21 THE COURT: Okay. Thank you. All right. PSC.

22 MS. JOHNSON: Thank you, your Honor.

23 What's good for the goose is good for the gander, and
24 if this Court determines that Mr. Gideon is entitled to have
25 Barry Cadden, as an example, invoke his Fifth Amendment rights

1 in response to questions that are helpful for Mr. Gideon's
2 client, then the PSC intends to have Mr. Cadden invoke his
3 Fifth Amendment privilege on questions that are helpful to the
4 plaintiffs, and I make that point only to be very clear with
5 everyone in this courtroom that that is the PSC's position.
6 If these go forward, then we will need some of that time as
7 well to protect the plaintiffs' interests.

8 Second, a word on timing. And I don't mean to be
9 jumping ahead to the scheduling motions, but I think it's
10 important to hear.

11 The PSC acknowledges that there are a plethora of
12 discovery-related motions before this Court and no matter how
13 efficient this Court is, it will, by definition, take some
14 time to resolve those. So, in recognition of that fact and
15 also the fact that multiple defendants have filed motions to
16 extend certain discovery, the PSC agreed in filings last night
17 that the PSC is not opposed to a 45-day extension of the
18 deadlines currently set in MDL Order 9.

19 And I mention that at this point, your Honor, because
20 it is our hope that these matters could all be resolved such
21 that that new compromised deadline could hold.

22 The PSC's primary goal now in this MDL is to collect
23 all of the discovery -- the common discovery from the settling
24 defendants and any other defendants from whom there can truly
25 be common discovery and put that into a single repository for

1 the benefit of all plaintiffs, and it is our hope that that
2 can be done expediently. As this Court knows, we've been
3 aggressive on scheduling. It is our hope that this additional
4 45-day extension can stick.

5 THE COURT: All right. Mr. Gideon.

6 MR. GIDEON: Yes, your Honor. Thank you.

7 This must be hyperbole day. I've now directly in
8 front of you been advised that what we're trying to do is
9 nothing but harassing and outrageous, and it's quite short of
10 that.

11 The first point that I think everybody has to agree
12 on is that we all recognize the importance of the Fifth
13 Amendment to the United States Constitution. We're not
14 suggesting that it's unimportant.

15 We're also not suggesting that the Caddens or
16 Conigliaros should get anything less than a full and fair
17 trial in the forum.

18 But at the same time, we want to adequately defend
19 our clients, who we believe have been victimized by the
20 conduct of those very same people, and we look at the rules
21 that have already been established in this jurisdiction. We
22 don't write de novo. And, as I said earlier, if we look at
23 the brief that was submitted on the 27th by the invoking
24 defendants and read the cases, it is clear that first you may
25 not make a blanket assertion of the Fifth Amendment. That is

1 not the prerogative of a litigant in this proceeding.

2 That is precisely what they've done. They've told us
3 that no matter what we ask, the witness will not respond. For
4 example, one of the questions that I would ask is: Is this,
5 in fact, a document you approved as director of pharmacy,
6 talking about compliance with USP 797 and 71?

7 Another question I would ask that doesn't reasonably
8 implicate any Fifth Amendment concerns is: Did anyone other
9 than Brigham & Women's Hospital ever inspect NECC before
10 electing to purchase product from them?

11 The law provides that it's not up to them to decide
12 in advance that they're going to assert the Fifth as to every
13 question, but instead for the Court to do a particularized
14 inquiry, *U.S. vs. Castro*, a First Circuit case, and then to
15 decide whether the invocation is appropriate.

16 Second thing, you would think from the presentation
17 in the papers that there has been a very, very careful
18 application of the Fifth Amendment to the discovery in this
19 case, and that's simply not true.

20 I will respectfully direct your attention to the
21 Cadden response to request for production No. 42, which asks
22 them to turn over to us the 8.7 million documents that the
23 affidavit of the United States Attorney for this district that
24 was filed as part of the FDA's papers said had been turned
25 over to these invoking defendants.

1 The response when we're asking for documents that
2 have been given to them by the United States is to assert the
3 Fifth Amendment. It simply doesn't apply.

4 It is true that I want to present this evidence in
5 the most efficient and at the same time effective manner in
6 order to adequately defend my clients and that's why I want to
7 have them invoke the Fifth Amendment on videotape. It is, I
8 respectfully submit --

9 THE COURT: Are other defendants being -- other
10 witnesses being videotaped?

11 MR. GIDEON: Yes, we have consistently videotaped
12 everybody in our cases. Everybody has been videotaped. We're
13 not selecting out Ms. Conigliaro or Mr. Cadden. All of our
14 clients were deposed at length by video.

15 And, finally, I point out that it's not just my
16 suggestion. That suggestion has met with favor in the very
17 case that was cited with approval by the invoking defendants,
18 the one I've mentioned twice already today, *The City of*
19 *Chicago vs. Reliable Auto Parts*, where the United States
20 district judge recommended to the parties in that case that
21 they take the depositions and, quote, "make full use of the
22 negative inference from their silence at trial."

23 The last point I would like to make is I -- I say
24 this with confidence. It is unlikely that videotaped
25 depositions of any of these individuals invoking the Fifth

1 Amendment will be leaked or released in the Tennessee
2 litigation; and, secondly, if they are utilized at trial, it
3 will be in Nashville, Tennessee and/or Cookeville, Tennessee.
4 The middle district also hears cases. And I think there's
5 little likelihood it will be impactful here.

6 THE COURT: You still have time to respond to
7 Ameridose's motion, but do you want to address the relevance
8 arguments now or would you prefer to wait?

9 MR. GIDEON: I do not wish to speak on that because I
10 don't want to undercut the argument by the St. Thomas Entities
11 who had the discussions with Mr. Moriarty and I've not.

12 THE COURT: All right. So, I'll wait to get the
13 brief on that.

14 And the relevance of Mr. Higgins individually?

15 MR. GIDEON: The same thing. St. Thomas Hospital --
16 the St. Thomas Entities are the ones leading that particular
17 issue and I don't want to undercut them.

18 THE COURT: Does someone want to --

19 MR. GIDEON: I'll yield to one of them.

20 THE COURT: Yes.

21 MS. KELLY: To start with, Mr. Higgins, your Honor --
22 this is Sarah Kelly for the St. Thomas Entities.

23 To begin with, Mr. Higgins, he's in a slightly
24 different position, but it is laid out in our papers. We're
25 still entitled to take his deposition. He has a lot of

1 relevant knowledge. He was, as I understand it, the day-to-
2 day sort of property manager and he was maintenance at NECC --
3 or GDC, the property manager, and for him to say ahead of
4 time, I do not have to show up, I'm going to invoke my Fifth
5 no matter what you ask me, and for us not to have the
6 opportunity to depose him and ask the questions we want to ask
7 and explain to a jury, likely in Tennessee, who this person
8 is, what he did, and why he can't tell them about it is going
9 to be important when we put on our case. I mean, it's easy to
10 say everybody knows here what happened. It's going to be
11 really easy to explain to the jury who is at fault, but it's
12 not. It's hard to put hundreds of documents in front of a
13 jury or read a deposition transcript or say there's going to
14 be an adverse inference instruction and we all know what it's
15 going to say, but we don't know what the Plaintiffs' Steering
16 Committee is going to say about an adverse inference
17 instruction. We don't know what a trial court judge is going
18 to say about that, and to sort of cut all that off right now
19 and say, All you need is written questions, we'll answer them,
20 we'll invoke our Fifth, no discovery for you, deal with the
21 documents, cuts us off in discovery and puts us at an unfair
22 disadvantage.

23 As for Mr. Moriarty's motion, I would have to address
24 the relevance questions at a later hearing.

25 THE COURT: That's fine.

1 MS. KELLY: I don't have all of the answers and
2 responses.

3 I would say that I disagree -- a lot of the people
4 here talking about Tennessee law who practice in Boston. My
5 understanding is there is not one extra line on the verdict
6 form for everybody else. There will be individual lines for
7 other defendants for which we've shown our case for
8 comparative fault. So, Ameridose would be on that form. We
9 could make that case. It wouldn't just get rolled up into one
10 additional line. So, if we were able to make that case, that
11 would matter for the fault of the St. Thomas Entities.

12 THE COURT: So, obviously, there are a lot of
13 competing interests here and we're trying to balance them.
14 Obviously, I'm considering alternatives.

15 The invoking defendants have mentioned their offer to
16 give answers to written interrogatory questions. So, why is
17 that -- I mean, obviously, it's -- you prefer to have a
18 deposition, but, as an alternative, why is that not
19 satisfactory for you?

20 MS. KELLY: Well, I would want to say two things in
21 response to that:

22 The first is -- I think Mr. Rabinovitz made the point
23 that, you know, the only questions we're allowed to ask have
24 to do with comparative fault. So -- like, there's one
25 question out there: Were you at fault? And the answer is:

1 Yes. And that's the end of it.

2 I mean, there is going to be a lot of questions that
3 in the ordinary course we would want to put to a deponent,
4 sort of the background, your education, your training, where
5 you worked, leading up to the actual events at issue.

6 So, those background questions, we'll call them, I
7 don't think there is any Fifth Amendment privilege. There two
8 cases cited in our papers, the *Moll* case and the *McIntyre's*
9 *Mini Computers Sales Group*, which came from Judge Saris,
10 listing out those kinds of topics, general employment
11 background, present employment, educational background,
12 general contacts with the plaintiff, those are the kinds of
13 questions we would want to put to a witness.

14 And your question is: Well, okay. There might be
15 some of those, but why don't you do it by written question?
16 And I would answer by saying what we want to do is be able to
17 tell a jury these -- just call it five people are responsible
18 and we are going to prove our case to you. And instead of
19 being able to say to them, And here's what that person said at
20 their deposition, I'll read you their background.

21 It's clear and it's widely recognized that a video of
22 that person explaining -- saying his name, where he grew up,
23 what he did, is going to stick with the jury. They're going
24 to see who that person is and that person is going to say on
25 videotape, I can't answer your question because I have a Fifth

1 Amendment right. And I think -- and I feel strongly that that
2 would stay with the jury and when they are assessing fault,
3 actually apportioning blame to a particular individual, having
4 seen that person and having seen those words come from that
5 person's mouth, they're more likely to do it. They're able to
6 understand who that person is and why that person is not there
7 testifying.

8 We're not arguing that there is not a valid Fifth
9 Amendment right here. I don't want to come back next month
10 and argue over 50 questions and whether the right should have
11 been asserted or shouldn't, but that videotape, to be able to
12 play it for the jury and explain who each of these individual
13 defendants is, I think is going to be very important at trial.

14 THE COURT: And, again, in balancing, obviously, you
15 would like the depositions to take place now and there's no
16 trial set in the criminal case, but often courts say you can
17 do this after the criminal case is over, take a deposition.

18 MS. KELLY: Are you asking whether I would agree to --

19 THE COURT: I'm not asking you to agree, but,
20 obviously, the timing isn't perfect.

21 MS. KELLY: I agree that the timing isn't perfect. I
22 think it's what we're faced with right now. I know that the
23 PSC is looking for a short trial date.

24 The deposition can be taken now. That can certainly
25 be covered by a protective order right now. I don't think it

1 raises the same concerns as, for example, the FDA's motion.
2 That's a different issue.

3 And as far as the videotapes being played at trial, I
4 think a trial about the STOPNC and St. Thomas Hospital in
5 Nashville, a videotape being played at a trial of a defendant
6 might be on trial in Boston, you know, six months or a year.
7 I don't know how much long later. I just think it's unlikely
8 to make a big splash.

9 THE COURT: All right. Thank you.

10 Mr. Gideon, did you want to respond to any of my --

11 MR. GIDEON: Two additional points.

12 THE COURT: Yes, of course.

13 MS. KELLY: Could I make one more point on the
14 30(b)(6) depositions that we've talked about?

15 THE COURT: Yes.

16 MS. KELLY: I heard a lot of it's very hard. We
17 don't have a current employer. We don't have a former
18 employee.

19 The law is clear that somebody has to be designated.
20 They've got to find somebody, a consultant, a lawyer. There's
21 somebody who has to read these documents and come in and
22 testify.

23 This comes up -- I was looking at the caselaw -- I
24 think frequently in litigation where the events, like asbestos
25 litigation, happened four years ago and there is no nobody.

1 This happens. There's no one who knows anything because the
2 event happened so long ago. They find somebody and they
3 educate them and they come in and answer. And, again, this is
4 important to us. The St. Thomas Entities are all going to be
5 subjected to a 30(b)(6) deposition. No one is saying the
6 documents are sufficient. We want a deposition and we think
7 the same true is for the other affiliated defendants.

8 THE COURT: Thank you.

9 MR. GIDEON: Thank you.

10 I just have a couple of additional points. One of
11 those is that the depositions of the invoking defendants won't
12 just be limited to their fault. It will deal with the fault
13 of other people as well and the personal knowledge or
14 information they have on that point.

15 The second thing I would like to point out is that
16 early on today, the counsel for the trustee suggested that we
17 should, frankly, just be satisfied with the documents that
18 we've been given and convince the jury just by giving them a
19 lot of documents.

20 Mr. Klarfeld who spoke just a few minutes ago
21 articulated the difficulty of designating someone to speak for
22 the entity representative because he said there wasn't anybody
23 who wasn't facing Fifth Amendment issues who could talk to
24 someone and bring them up to speed, which is a recognition --
25 a candid recognition by that gentleman and the others that the

1 documents are not sufficient, not sufficient even to prepare
2 someone for a deposition, let alone to conduct a trial with.

3 That's why we should be given the opportunity to
4 identify these people, as Sarah just said, to allow a jury to
5 know who Barry Cadden is, to recognize who Barry Cadden is,
6 and then to be able to convince the jurors of the importance
7 of that negative inference based on the substance of the
8 questions that have been asked.

9 And keep in mind, too, that these cases will be
10 tried, not all together, but one after another, over and over
11 again. It's far more efficient to take that videotaped
12 deposition just one time.

13 THE COURT: And do you have similar views about the
14 written interrogatories -- deposition by written questions?

15 MR. GIDEON: Yes. It is incredibly ineffective in
16 terms of persuasion. And I'll be candid with you. I think
17 that it is inadequate because it is ineffective in terms of
18 persuasion.

19 THE COURT: All right.

20 MR. GIDEON: Thank you.

21 MR. GOTTFRIED: Your Honor, briefly, since --

22 THE COURT: Yes.

23 MR. GOTTFRIED: Referring back to the trustee, I just
24 want to make three very quick points.

25 The Johns Manville case, Johns Manville was the

1 party. This is a nonparty. There are alternatives. I'm not
2 just simply saying give them all the documents. That's all
3 they get. I've given alternatives. Their expert can review
4 those documents and testify.

5 And the question is: What do they need for
6 comparative fault? Do they need to simply show that these
7 people bought tainted medicine or do they need more?

8 Stipulations. One way or another, there's going to
9 be an adverse inference, whether it's going to be the adverse
10 inference in a way that the affiliated and invoking defendants
11 suggest or it's going to be the way that the Tennessee folks
12 suggest. Either way, that's sufficient to prove comparative
13 fault against NECC, given all the alternatives, and putting
14 that burden on the trustee and on the estate and on the
15 victims on a balancing situation for a nonparty is something
16 that should not happen.

17 THE COURT: Yes, Mr. O'Hara.

18 MR. O'HARA: Thank you.

19 MR. WOLK: Your Honor, I don't mean to interrupt, but
20 Christopher Wolk, the Premier defendants.

21 THE COURT: Yes.

22 MR. WOLK: Before the invoking defendants have an
23 opportunity to respond, I would like to --

24 THE COURT: Yes, I think that makes sense.

25 MR. WOLK: Thank you, your Honor.

1 As I represented, we represent the Premier defendants
2 who are located in Vineland, New Jersey. Currently there's
3 about 50 cases pending against five individual doctors
4 performed injections in this case as well as our clinic.

5 Most, if not all, of the arguments you've heard
6 already in opposition to this motion for a protective order to
7 quash apply to us. I would like to add the following:

8 A comment was made that the inference that we're
9 going to get from the Fifth Amendment invocation in this case
10 is an attractive piece of evidence, and I would like to
11 respectfully disagree. In fact, it's not all that attractive.

12 It's no secret that in this case, the claims against
13 our clinics is that we had a duty to perform some reasonable
14 investigation, some due diligence to find out just exactly who
15 we were buying these compounding drugs from. For us to have
16 an inference that NECC did it all wrong is just as much
17 telling the jury that they did it all wrong from the very
18 beginning and that my clinic, what fools they were to order
19 from them from the beginning.

20 I have to have the opportunity to explain to a jury
21 that they weren't all wrong. They didn't do it all wrong from
22 the beginning and, in fact, there was a reputation coming out
23 of NECC that was respectable and one that we could rely on,
24 and that goes back to the points that were made earlier, which
25 is some of the questions that we're going to ask at these

1 depositions, such as background, education, pharmacy
2 licensure, their good standing with boards of pharmacy, not
3 only in Massachusetts, but in other states, the reputation
4 with other hospitals and clinics, is important information
5 that we need to get at a deposition, which I do not believe
6 that can -- they can assert a Fifth Amendment privilege when
7 answering those questions, and it's important evidence to help
8 my client fight their way out of this corner that we're being
9 painted into where everyone is throwing their hands up in the
10 air and saying, We don't have a witness. We have a lot of
11 documents and, in fact, we can look at all those documents.
12 We know what they are, but we couldn't even educate a former
13 employee on what they mean. How am I supposed to educate
14 myself about what they mean in preparation to try this case
15 and then educate a jury on what they mean?

16 We need someone who can come and educate the jury,
17 not only that, yes, we're going to invoke our Fifth and we're
18 going to get the inference, but also so that I can educate the
19 jury it wasn't all bad from the beginning.

20 The *Hoffmann* case was cited. I would like to address
21 that. In the *Hoffmann* case, as I'm sure your Honor is aware,
22 the courts -- it states that the courts cannot effectively
23 determine whether a responsive answer to a question or an
24 explanation of why it cannot be answered, except in the
25 context of a proposed question. We don't have that yet.

1 Your Honor asked about written questions in this
2 case, and I would join in the arguments that they are wholly
3 ineffective and that they are -- they're not even close to
4 being persuasive in front of a jury.

5 Your Honor, I would also like to add -- address the
6 publicity point, which is these cases, again, would be tried
7 in New Jersey, maybe Camden County, New Jersey or Cumberland
8 County, New Jersey, far far away from where these criminal
9 trials would be held, and I think a protective order could
10 absolutely help to protect from any of these videos being
11 disseminated.

12 So, the arguments apply to the New Jersey cases as
13 well, your Honor, and not only because we need information
14 about an inference, but we need information to defend our
15 cases. It does go to the comparative fault, which we also
16 have in New Jersey and we are asserting it, but it also goes
17 to our own defense and it's relevant to proximate cause as
18 well. What was the cause of the contamination here? We're
19 going to argue it wasn't anything the Premier defendants did
20 to cause the contamination, but it had to do with what they
21 did.

22 Now, one last point, your Honor. A lot has been said
23 about expert witnesses. We can rely on our experts to review
24 the documents, come in and testify.

25 It's not always the case that an expert can come into

1 court and rely on hearsay testimony, and I need to protect
2 myself and my client later on from having an objection that if
3 my expert relied on a piece of paper and I get a hearsay
4 objection because I didn't have someone testify about what was
5 in that document, then, again, I'm back in the corner where I
6 started from. So, those are all the reasons why the motion
7 should be denied from our perspective.

8 THE COURT: And before we go back to Mr. O'Hara, two
9 suggestions that have percolated up, one from Mr. Gottfried
10 about stipulations and trying to work out stipulations before
11 taking at least the trustee's 30(b)(6) deposition, and then
12 also Ms. Johnson's suggestion that if, in fact, it ends up
13 that I order a 30(b)(6) deposition of the trustee, that you
14 all should pay for it.

15 (No response.)

16 THE COURT: You don't have any reactions to that?

17 MR. GIDEON: Yes, we do. I just heard Ms. Johnson's
18 suggestion. The response has to be based on the fact that it
19 was for the first time today that we've heard that the cutoff
20 for the insurance carriers would occur on June 4th.

21 Now, I'm confident I'm going to hear that that data
22 is buried somewhere in Footnote 68 on Page 198 of this plan.
23 Maybe it is. And I'm sure we'll be accused of negligence in
24 not finding that, but if that's the central point with respect
25 to opposing a 30(b)(6) deposition, that it's going to cost

1 some money and the insurance carriers aren't going to pay for
2 it from June 4th forward, a far better solution is let's get
3 it done before June 4th rather than have us pay for it, and
4 I'm here to say I'm ready to do that before June 4th. Whether
5 it's a Saturday or a Sunday makes no difference. We'll do it
6 before June 4th.

7 THE COURT: Is that Wednesday? Yes, Wednesday.

8 MR. O'HARA: Thursday.

9 THE COURT: Thursday.

10 MR. FERN: Your Honor, Frederick Fern.

11 Mr. Gideon is totally correct. On May 2nd, 2014, in
12 the plan and the settlement agreement with PMIC that was filed
13 in this court and the bankruptcy court, it said within 14 days
14 after the Chapter 11 plan was confirmed, that the PMIC policy
15 would be exhausted and extinguished, in those exact words.

16 Last week on May 20th, when Judge Boroff confirmed
17 the third amended Chapter 11 plan, that kicked in that
18 exhaustion of the PMIC policy.

19 Just one other point, Judge. Though Mr. Gottfried
20 spoke about the post-confirmation officer being Paul Moore,
21 the trustee, changing hats from the trustee to the post-
22 confirmation officer, also within that plan in Section 6.01 of
23 the third amended Chapter 11 plan that was confirmed last week
24 by Judge Boroff, therein it says that any officer -- director
25 or officer is terminated and is deemed discharged.

1 So, there is no officer pursuant to 30(b)(6) --
2 officer, director or managing agent pursuant to 30(b)(6) which
3 can be tagged to testify on behalf of NECC, and any other
4 person must consent, which has been spoken about before, and
5 there hasn't been anybody who is willing to testify, who is
6 willing to consent to provide their testimony as a 30(b)(6)
7 witness on behalf of NECC.

8 THE COURT: All right. Mr. O'Hara.

9 MR. O'HARA: Your Honor, I would just make a couple
10 of quick points:

11 One, to the extent that Mr. Gideon suggests that
12 they're entitled to ask questions of the invoking defendants
13 relating to the activities of others, I would simply note that
14 the -- there are conspiracy allegations in the criminal
15 indictments which clearly would cover any conceivable question
16 that Mr. Gideon or his colleagues could come up with.

17 So, the issue is not something that permits them to
18 get testimony in that area where there are allegations in the
19 indictments of a conspiracy here.

20 Second, I think Mr. Gideon doth protested much when
21 they already have in their responses the -- more than
22 sufficient ways of proving the adverse inference from the
23 responses and requests for admission and interrogatories, and
24 with due respect to Mr. Gideon, there is no law that says that
25 the balancing of these factors compels this Court to order

1 videotaped depositions where adverse inference responses
2 already exist in the written responses and, respectfully, they
3 declined the opportunity to submit their written questions to
4 us.

5 So, with -- on the basis of that and the *Pratt* and
6 *Cowens* decision, which I think your Honor has in our brief,
7 which says that where there is this incredible overlap, we are
8 -- the protective order is appropriate.

9 I think what we would respectfully suggest is that
10 the protective order be allowed as to the videotaped
11 depositions and that they be left with their discovery, which
12 they already have in the adverse inference, availability to
13 prove their comparative fault issues.

14 THE COURT: All right. Does anyone wish to speak
15 about this who is on the phone?

16 (No response.)

17 THE COURT: No. So, we are now at 1:20. I do want
18 to let everyone get some lunch because, otherwise, I'm doing a
19 disservice to Judge Zobel, since many of us will be back here
20 at 2 o'clock.

21 What I would suggest, because the Tennessee Clinic
22 Defendants' motion to compel at No. 3, I believe the response
23 was just filed yesterday. So, I'm prepared to either hear
24 that at the next scheduled conference, which is June 28th or
25 something like that, or if the parties to that motion feel

1 that I should hear it sooner, I am available on June 15th, at
2 3 o'clock, if that would work.

3 MS. JOHNSON: The PSC was actually going to suggest,
4 your Honor, that we would waive oral argument on that motion
5 if the Tennessee defendants would agree to the same.

6 MR. TARDIO: Yes, your Honor, we would be comfortable
7 with the Court ruling on the papers.

8 THE COURT: All right. So, I will not schedule a
9 separate oral argument on that.

10 And I think, actually, Item No. 4 kind of dovetails
11 into some of our discussion in front of Judge Zobel. So, I
12 would table that until this afternoon or we can take it up at
13 a later time.

14 MR. RABINOVITZ: Your Honor, could I make two
15 comments before you close this session?

16 THE COURT: Yes.

17 MR. RABINOVITZ: Very, very briefly.

18 I want to say that all the argument about the trials
19 happening in New Jersey or the trials happening in Tennessee
20 and, therefore, it's far away, you know, we've all seen videos
21 on the Internet that you can be anywhere in the world and post
22 things on the Internet. So, I would say that those arguments
23 are not persuasive.

24 I also wanted to point out that these questions about
25 background and things like that, I would submit to the Court

1 that the discovery stay doesn't permit that. Those kinds of
2 questions aren't relevant to the defense and prosecution of
3 these third-party claims, and now we're going to say that they
4 want to buttress their adverse inference by being able to get
5 into somebody's background. That's as attenuated as I've
6 heard in this entire argument. That's all I wanted to say.
7 Thank you.

8 THE COURT: All right. Briefly, because I think
9 we're going over some of the ground that's already been
10 covered.

11 MR. KLARFELD: I would like to make one point with
12 respect to Mr. Higgins.

13 THE COURT: Yes.

14 MR. KLARFELD: The Tennessee defendants have not
15 identified Mr. Higgins as a comparative fault party in their
16 answer. So, they can't list him on the verdict form. So, for
17 all the other reasons --

18 THE COURT: I can't hear you. Can you speak up?

19 MR. KLARFELD: Better? Sorry.

20 The Tennessee defendants did not identify Mr. Higgins
21 as a comparative fault party in their answer. So, they can't
22 list him on the verdict form. So, for all the reasons we said
23 previously as well as that one, his deposition really ought
24 not occur and if it were to occur, we've offered a Rule 31
25 deposition.

1 THE COURT: All right. Thank you very much.

2 MS. JOHNSON: Thank you, your Honor.

3 COURTROOM DEPUTY CLERK YORK: All rise. This Court
4 is in recess.

5 (Adjourned, 1:25 p.m.)
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10 C E R T I F I C A T E

11 I, Catherine A. Handel, Official Court Reporter of the
12 United States District Court, do hereby certify that the
13 foregoing transcript, from Page 1 to Page 81, constitutes to the
14 best of my skill and ability a true and accurate transcription of
15 my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In
16 Re: New England Compounding Pharmacy, Inc., Products Liability
17 Litigation.

18
19 June 3, 2015
20 Date

/s/Catherine A. Handel
Catherine A. Handel RPR-CM, CRR
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